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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. ~~1345~~ 162

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,
Petitioner,

vs.

BENDIX CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID RINES
ROBERT H. RINES
RINES AND RINES
No. Ten Post Office Square,
Boston, Massachusetts 02109
Attorneys for Petitioner

R. L. MERSEREAU, INC., 916 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Doris Nyyssonen, administratrix of the estate of Einard Nyyssonen, deceased, respectfully prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the First Circuit, entered in the above-entitled action on February 9, 1966 (R. 1202), in which the petitioner was the plaintiff-appellant. On February 25, 1966 (R. 1209), the Court of Appeals, without opinion, denied a timely petition for rehearing, filed February 23, 1966 (R. 1203).

This case has been here once before, No. 260, October Term, 1965, certiorari denied, 382 U.S. 847, October 11, 1965, rehearing denied, November 22, 1965, 382 U.S. 934.

A certified transcript of the record since developed in the Court of Appeals (together with 9 copies thereof), is furnished herewith, numbered consecutively with the previous record. Of even date herewith, the petitioner is filing a motion for leave to use also this previous record.

OPINION BELOW

The opinion of the Court of Appeals (R. 1199-1202), reported at 356 F.2d 193, appears as an Appendix to this petition.

JURISDICTION

The order of the said Court of Appeals was dated and entered February 9, 1966 (R. 1202). A timely petition for rehearing was denied February 25, 1966 (R. 1209).

The jurisdiction of this Court to review the above-mentioned judgment of the said Court of Appeals is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I

Does a Court of Appeals have authority to prevent a District Court from entertaining a motion under Rule 60(b) of the Federal Rules of Civil Procedure?

II

Even if the answer to Question I should be in the affirmative, is this Rule 60(b) properly construed to deny the relief provided thereby in an action in which the granting of such relief, by the District Court, would be out of conformity with a previous ruling, in the same action, on appeal, by the Court of Appeals?

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Extract from the Fifth Amendment:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Extract from Rule 60(b) of the Federal Rules of Civil Procedure:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) * * * (5) * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *

STATEMENT OF THE CASE

After this Court's denial, on November 22, 1965, of the petition for rehearing of her petition for certiorari, No. 260, October Term, 1965, the petitioner promptly, on December 15, 1965 (R. 1185), filed, in the Court of Appeals for the First Circuit, a "Motion for Leave to File, in the District Court, a Motion under the Provisions of Rule 60(b) (1), (2), (3) and (6) of the Federal Rules of Civil Procedure" (R. 1186), accompanied by a copy of the proposed motion itself (R. 1189). The petitioner was com-

pelled so to proceed by *Wilson Research Corporation* v. *Piolite Plastics Corporation*, 1964, 1 Cir., 336 F.2d 303, 305; R. 1199 and Appendix, page 2a, footnote.

This motion was denied by the Court of Appeals on February 9, 1966 (R. 1202).

The Court of Appeals assigned four reasons for this denial.

Background

In order that this Court may obtain a proper understanding of these reasons, it should first be made acquainted with some of the background.

There are two judgments in the District Court. The first and original judgment, entered April 29, 1963 (R. 969), was that from which the petitioner entered the appeal that led to this Court's denial of her petition for certiorari. The second judgment was that which was entered subsequent to October 15, 1965 (R. 1185), subsequent to the denial of certiorari, pursuant to the mandate of the Court of Appeals.

It is this second judgment with which we are here concerned, not the first and original judgment. This second judgment was based, in part, upon a ground new and entirely different from and contrary to the ground upon which the District Court had based its original judgment (R. 1139). That new and entirely different and contrary ground had never previously, and has never since, been litigated (or even argued) between the parties, and no evidence had even been offered in the District Court, either in support thereof or opposition thereto. That new and entirely different and contrary ground, furthermore, has been admitted by the respondent to be false (R. 1172, second paragraph); and, as part of her proposed motion under Rule

60(b), the petitioner prays (R. 1190) that the case be reopened in the District Court, for the purpose of permitting the petitioner to offer expert fact evidence to prove its falsity.

The Four Reasons for the Denial of the Petitioner's Motion by the Court of Appeals

The first reason assigned by the Court of Appeals for denying the petitioner's motion was:

> "In part the proffered motion * * * is clearly time barred."

How could that be? The said second judgment, which is the judgment relief from which the petitioner seeks (see page 4, *supra*), was entered, as before stated, subsequent to October 15, 1965; and, as also already stated, on the said page 3, *supra*, the petitioner filed her said motion on December 15, 1965.

The second reason for denying the petitioner's motion was as follows:

> "the remainder of the motion * * * is but a thinly disguised attempt to induce the District Court to reverse the decision of this Court."

The petitioner has never made, and does not now make, any "disguise" of the fact that that is precisely what she seeks to do by her proposed motion under Rule 60(b). The petitioner seeks to rectify, in the District Court, through the medium of expert fact evidence, the error of the Court of Appeals that is described at the bottom of page 4, *supra*.

The third reason for the denial of the motion was that the expert fact evidence referred to in line 3 at the top of this page was not "newly discovered", but would serve for the purpose only of demonstrating "a supposed misconception in our opinion".

That "misconception", however, as the petitioner is prepared to prove, was actual, not merely "supposed". She has been denied the right to offer that proof, not only in the District Court, but also in the Court of Appeals itself (R. 1205). As for the objection that this proffered expert fact evidence was not "newly discovered", it is of the same nature that the courts have ruled to constitute a proper ground for reopening a case in the District Court. *California Research Corporation* v. *Ladd*, 1966, C.A.D.C., 356 F.2d 813, 821-822.

The fourth reason for the denial of the motion was:

> "Treating the motion or the proposed motion, as a further application for rehearing, * * * It contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion."

The fact, however, is that the petitioner did do the very thing that, the Court of Appeals now says, she should have done (R. 1135). But the petition for rehearing was entirely ignored (R. 1182), and the petitioner was never given an opportunity to argue it, either orally or by brief, though she requested the privilege of both (R. 1140, 1152, 1166). The Court of Appeals admits (Appendix, p. 1a) that the petition for rehearing was denied "without opinion".

Attention is invited to this Court's opinion, as recent as March 21, 1966, *Kent* v. *United States*, 382 U.S. .....:

> "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons"

This Court, at page ....., pronounced such procedure to constitute "procedural arbitrariness".

The question now before this Court is whether, since the Court of Appeals refused to adjudicate the petition for re-

hearing, she is or is not now entitled to invoke the provisions of Rule 60(b).*

None of the Four Reasons Questions the Justice of the Petitioner's Contention That She Has Been Denied Due Process

It will thus be observed that the Court of Appeals has not questioned the correctness of the petitioner's contention that she has failed to receive justice in the Court of Appeals for the First Circuit. The only issue is whether the Court of Appeals is empowered to deny the petitioner the opportunity now to obtain this justice in the District Court.

REASON FOR GRANTING THE WRIT

This petition raises the important question as to whether, under the interpretation that the Court of Appeals has placed upon Rule 60(b), the aim hoped to be obtained by means thereof has not been frustrated. On March 7, 1966, in *Surowitz* v. *Hilton Hotels Corporation,* 382 U.S. ....., this Court said:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals."

There is conflict among the Courts of Appeals as to the answer to this question. There is conflict even among the members of the same Court of Appeals, *S. C. Johnson & Son, Inc.* v. *Johnson,* 1949, 2 Cir., 175 F.2d 176, 177, 183-184, certiorari denied, 338 U.S. 860, as to which conflict Judge Clark "expressed a word of concern".

In the before-mentioned *Wilson Research Corporation* case, 336 F.2d 303, at page 305, the Court of Appeals for

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*As for the concurring opinion (Appendix, p. 3a), it demonstrates only a confusion as to the difference in the law between infringement and anticipation (R. 1206-1207).

the First Circuit appears to have agreed that there was reason for Judge Clark's "concern", but justified its failure to agree with that "concern" upon the ground of

> "the Supreme Court's failure to act upon the 1955 Report of the Advisory Committee on Rules for Civil Procedure wherein the Committee * * * proposed the addition to Rule 60(b) of the following sentence: 'Such motion does not require leave from an appellate court, though the judgment has been affirmed or settled upon appeal to that Court."

The "failure to act" of this Court, here referred to, can certainly not be construed as either approval or disapproval of the Committee's proposal. It would seem rather to indicate that this Court has some doubt upon the point.

That doubt ought to be resolved, one way or the other, under the facts of the present case. This is an issue which has not been, but should be, settled by this Court (Rule 19(b) of this Court).

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID RINES
ROBERT H. RINES
RINES AND RINES
No. Ten Post Office Square,
Boston, Massachusetts 02109
Attorneys for Petitioner

United States Court of Appeals

For the First Circuit

No. 6189

DORIS NYYSSONEN, Administratrix
of the Estate of Einard Nyyssonen, Deceased,
PLAINTIFF, APPELLANT,

v.

BENDIX CORPORATION,
DEFENDANT, APPELLEE.

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

David Rines, Robert H. Rines and *Rines and Rines* for appellant.
Morris Relson for appellee.

OPINION OF THE COURT

ON MOTION FOR LEAVE TO FILE MOTION UNDER RULE 60(b)

February 9, 1966.

PER CURIAM. Plaintiff, Nyyssonen, brought suit for infringement of two patents. The district court found both to be invalid and not infringed. On appeal we affirmed the finding of noninfringement, but declined to consider the question of validity. *Nyyssonen* v. *Bendix Corp.*, 1 Cir., 1965, 342 F.2d 531. Plaintiff moved for rehearing, alleging a number of derelictions, if not complete abdication, of our judicial function. Upon our denial without opinion, plaintiff sought certiorari. This was denied October 11, 1965.

Plaintiff has now filed a motion in this court* for leave to file, in the district court, a motion under Rule 60(b) (1), (2), (3) and (6). In part the proffered motion asks the district court to reverse itself for lack of consideration of plaintiff's case in its original decision. This would be improper for a number of reasons, not the least of which is that it is clearly time barred. Rules 60(b); 6(b); see *Corn* v. *Guam Coral Co.*, 9 Cir., 1963, 318 F.2d 622, 628-29; 7 Moore, Federal Practice 319-21 (2d ed. 1955).

Examination of the remainder of the motion discloses that it is but a thinly disguised attempt to induce the district court to reverse the decision of this court. For example: "There was no evidence to support this holding . . . [of the Court of Appeals]"; "[T]he plaintiff has never had her day in court . . ."; "The ruling of the Court of Appeals . . . constituted mistake and inadvertence on the part of the Court of Appeals." In one instance the plaintiff speaks of new evidence. It is not alleged to be newly discovered, but is described merely as evidence which would meet a supposed misconception in our opinion.

It is our province, and apart from review by the Supreme Court, our province only, to correct errors in our decisions. The motion which plaintiff desires to file in the district court would be entirely without its jurisdiction. The motion for leave to present these matters to the district court is frivolous.

Treating the motion, or the proposed motion, as a further application for rehearing, it must also be denied. It contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion. Indeed, much of the motion merely restates plaintiff's original petition. We do not propose, after one petition for

*This was, of course, the proper procedure. *Wilson Research Corp.* v. *Piolite Plastics Corp.*, 1 Cir., 1964, 336 F.2d 303.

rehearing and a petition for certiorari have been denied, to entertain successive petitions of such a nature.

The motion for leave to file is denied.

ALDRICH, *Chief Judge*, (concurring). Because it is sometimes difficult to sweep aside assertions of deprivation of rights, even though untimely, and even though the speaker manifestly protests too much, I will add a comment about the least unsound of the claims here asserted. I would like to observe, that quite apart from the grounds given in this court's original opinion, I find the district court's holding of noninfringement supported by other of its findings which, in turn, are adequately supported by the record. In particular, I refer to findings number 40 and 43, the latter of which reads, "The accused devices were the result of applying Glass's teachings . . .," *i.e.*, the teachings of a prior art patent. I have searched plaintiff's arguments for an explanation of how the accused devices deviated from Glass's disclosure and have found nothing that could justify overturning the district court's finding that they did not, certainly nothing which indicates that what deviations there might have been, followed from plaintiff's disclosures rather than other prior art. "If the accused machine is substantially identical with the prior art there can be no infringement." *Galion Iron Works & Mfg. Co. v. Beckwith Mach. Co.*, 1939, 105 F.2d 941, 942.